

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RENE HERRERA,

Plaintiff,

v.
U.S. BANK NATIONAL
ASSOCIATION; BAC HOME
LOANS SERVICING, LP;
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.;
RECONTRUST COMPANY,
NATIONAL ASSOCIATION,

Defendants.

CASE NO. 14cv0134 JM(BLM)

**ORDER GRANTING MOTION TO
DISMISS; PERMITTING
PLAINTIFF TO FILE MOTION TO
AMEND**

Pursuant to Fed.R.Civ.P. 12(b)(6), Defendants U.S. Bank National Association, as Trustee on behalf of CSAB Mortgage-Backed Pass-Through Certificates, Series 2006-2 (“USB”); Bank of America, N.A. (erroneously sued as BAC Home Loans Servicing, L.P.) (“BAC”); Mortgage Electronic Registration Systems, Inc. (“MERS”); and Recontrust Company, N.A. (“Recontrust”) move to dismiss all claims asserted in Plaintiff Rene Herrera’s complaint. Plaintiff opposes the motion. Pursuant to Rule 7.1(d)(1), the court finds the matters presented appropriate for resolution without oral argument. For the reasons set forth below, the court grants the motion to dismiss the Fair Debt Collection Practices Act claim, declines to address the state law claims, and grants Plaintiff an opportunity to file a motion for leave to amend.

BACKGROUND

On December 4, 2013, in the Superior Court for the County of San Diego, Plaintiff commenced an action alleging eight claims for relief: (1) declaratory relief; (2) negligence; (3) quasi contract; (4) violation of 15 U.S.C. §1692; (5) violation of Cal. Bus. and Prof. Code §17200; (6) accounting; (7) cancellation of instruments; and (8) quiet title. On January 17, 2014, Defendants removed the action from state court by asserting federal question jurisdiction based upon the Fair Debt Collection Practices Act (“FDCPA”) claim, 15 U.S.C. §1692, and supplemental jurisdiction over the state law causes of action pursuant to 28 U.S.C. §1337(a).

10 On June 23, 2006, Plaintiff executed a Note and Trust Deed in favor of
11 Greenpoint Mortgage Funding Inc. (“Greenpoint”) in the amount of \$412,500 to
12 purchase residential property located in Encinitas, California. (Compl. ¶34). MERS
13 was named on the Deed of Trust as the “nominee” and “beneficiary” and Martin
14 Conveyancing Corp. as the trustee. Id. Plaintiff alleges that there are no recorded
15 assignments of the Note or Trust Deed. (Id. ¶35, 36).

16 On August 4, 2011, Recontrust, “purporting to act as ‘agent for the Beneficiary’
17 caused to be recorded a ‘Notice of Default’ purporting to name U.S. Bank, as Trustee
18 for the Certificate holders of CSAB Mortgage-Backed Pass-Through Certificates,
19 Series 2006-03.” (Compl. ¶37). Recontrust was not identified as an authorized agent
20 under the Note and Deed of Trust. (Compl. ¶38). Similarly, Plaintiff alleges that USB
21 was not the ‘Beneficiary” of the Deed of Trust. (Compl. ¶39).

22 In broad brush, Plaintiff sets forth a securitization theory of liability. Plaintiff
23 alleges that his loan was bundled into mortgage backed securities and then sold to
24 investors in the form of certificates. (Compl. ¶18). Plaintiff seeks to establish that
25 Defendants USB and BAC “were not his true creditors and as such have no contractual
26 right to legal, equitable, or pecuniary interests in the debt obligation secured by the real
27 property that is the subject of these proceedings.” (Oppo. at p.1:4-8). Plaintiff also
28 alleges that the lack of a written recorded assignment of the original Note to USB

1 somehow renders the Note and Deed of Trust unassigned. (Compl. ¶¶ 49, 50).

2 DISCUSSION

3 Legal Standards

4 Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in
 5 "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.
 6 1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a
 7 "cognizable legal theory" or sufficient facts to support a cognizable legal theory.
 8 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). Courts should
 9 dismiss a complaint for failure to state a claim when the factual allegations are
 10 insufficient "to raise a right to relief above the speculative level." Bell Atlantic Corp
 11 v. Twombly, 550 U.S. 544, 555 (2007) (the complaint's allegations must "plausibly
 12 suggest[]" that the pleader is entitled to relief); Ashcroft v. Iqbal, 556 U.S. 662 (2009)
 13 (under Rule 8(a), well-pleaded facts must do more than permit the court to infer the
 14 mere possibility of misconduct). "The plausibility standard is not akin to a 'probability
 15 requirement,' but it asks for more than a sheer possibility that a defendant has acted
 16 unlawfully." Id. at 678. Thus, "threadbare recitals of the elements of a cause of action,
 17 supported by mere conclusory statements, do not suffice." Id. The defect must appear
 18 on the face of the complaint itself. Thus, courts may not consider extraneous material
 19 in testing its legal adequacy. Levine v. Diamanthuset, Inc., 950 F.2d 1478, 1482 (9th
 20 Cir. 1991). The courts may, however, consider material properly submitted as part of
 21 the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555
 22 n.19 (9th Cir. 1989).

23 Finally, courts must construe the complaint in the light most favorable to the
 24 plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir. 1995), cert. dismissed, 116
 25 S. Ct. 1710 (1996). Accordingly, courts must accept as true all material allegations in
 26 the complaint, as well as reasonable inferences to be drawn from them. Holden v.
 27 Hagopian, 978 F.2d 1115, 1118 (9th Cir. 1992). However, conclusory allegations of
 28 law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In

1 Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir. 1996).

2 THE FDCPA Claim

3 Congress passed the FDCPA to protect consumers from debt collectors' abusive
 4 debt collection practices. Baker v. G. C. Services Corp., 677 F2d 775 (9th Cir. 1982).
 5 The FDCPA prohibits harassing or deceptive conduct in the collection of a debt. 15
 6 U.S.C. §§ 1692d, 1692e. Congress enacted the FDCPA after finding "abundant
 7 evidence of the use of abusive, deceptive, and unfair debt practices by many debt
 8 collectors." Id. § 1692(a). The FDCPA states, in part, that "[a] debt collector may not
 9 use unfair or unconscionable means to collect or attempt to collect any debt." Id.
 10 § 1692f. A debt collector may not collect from a consumer "any amount (including
 11 interest, fee, charge, or expense incidental to the principal) unless such amount is
 12 expressly authorized by the agreement creating the debt or permitted by the law." Id.

13 "To be held liable for violation of the FDCPA, a defendant must - as a threshold
 14 requirement - fall within the Act's definition of 'debt collector.'" Izenberg v. ETS
 15 Servs., LLC, 589 F.Supp.2d 1193, 1198 (C.D. Cal.2008) (citing Heintz v. Jenkins, 514
 16 U.S. 291, 294 (1995)). The FDCPA defines a "debt collector" as "a person who uses
 17 any instrumentality of interstate commerce or the mails in any business the principal
 18 purpose of which is the collection of any debts, or who regularly collects or attempts
 19 to collect, directly or indirectly, debts owed or due or asserted to be owed or due
 20 another." 15 U.S.C. § 1692a. The definition explicitly excludes creditors, as well as
 21 loan originators or assignees, who obtained the right to collect on loan when the loan
 22 was not in default. See 15 U.S.C. § 1692a(4), § 1692a(6) (A)-(B), § 1692a(ii)-(iii).
 23 "The law is well-settled that creditors, mortgagors (sic), and mortgage servicing
 24 companies are not debt collectors and are statutorily exempt from liability under the
 25 FDCPA." Aguirre v. Cal-Western Reconveyance Corp., No. CV-11-6911, 2012 WL
 26 273753, at *7 (C.D.Cal. Jan.30, 2012) (quotation omitted). Similarly, "foreclosing on
 27 a property pursuant to a deed of trust is not the collection of a debt within the meaning
 28 of the FDCPA." Izenberg, 589 F.Supp.2d at 1199 (quotation omitted); see also Reed

1 v. Wells Fargo Home Mortg. Inc., No. 10–2133, 2010 WL 5136196, at *7 (E.D. Cal.
 2 Dec.10, 2010) (“The activity of foreclosing on a property pursuant to a deed of trust is
 3 not the collection of a debt within the meaning of the FDCPA”) (quotation omitted).

4 Here, the FDCPA claim fails on many levels. First, Plaintiff does not identify
 5 which of the FDCPA provisions were allegedly violated by Defendants. Second,
 6 Plaintiff fails to plausibly allege that Defendants are “debt collectors” for purposes of
 7 the FDCPA. Third, even a general allegation that Defendants are “debt collectors” fails
 8 to state a claim because mortgagees and mortgage servicing companies are not debt
 9 collectors for purposes of the FDCPA. See Scott v. Wells Fargo Home Mortg., 326
 10 F.Supp.2d 709, 718 (2003) (“[T]he law is well-settled ... that creditors, mortgagors, and
 11 mortgage servicing companies are not debt collectors and are statutorily exempt from
 12 liability under the FDCPA.”).

13 In light of the well-established authorities cited herein and Plaintiff’s failure to
 14 present any legal argument in opposition to Defendants’ authorities, the court grants
 15 the motion to dismiss this claim. While Plaintiff requests leave to amend, the court
 16 notes that Plaintiff fails to identify any basis under which Plaintiff may state a FDCPA
 17 claim. Consequently, the court grants the motion to dismiss the FDCPA claim without
 18 prejudice and permits Plaintiff an opportunity to file a motion to amend. In the event
 19 Plaintiff desires to pursue the FDCPA claim, he must file and serve a motion for leave
 20 to amend, with the proposed amended complaint attached as an exhibit to the motion,
 21 within 20 days of entry of this order.¹

22 Finally, the court informs the parties that Plaintiff’s failure to state a valid
 23 FDCPA claim in an amended complaint will result in the court declining to exercise
 24 supplemental jurisdiction over the remaining state law claims pursuant to 28 U.S.C.
 25 §1337(c) and remanding the action to state court.

26
 27 ¹ In the event Plaintiff does not contact chambers (as required by Local Rule
 28 7.1(b)) to schedule a hearing date on motion to amend within 20 days after entry of this
 order, the court, without further notice, will dismiss the FDCPA claim with prejudice
 and remand the action to state court.

1 In sum, the court grants the motion to dismiss the FDCPA claim, declines to
2 address the state law claims until Plaintiff states a valid federal claim, and permits
3 Plaintiff an opportunity to file a motion to amend to state a valid FDCPA claim.

4 **IT IS SO ORDERED.**

5 DATED: May 5, 2014


Hon. Jeffrey T. Miller
United States District Judge

6 cc: All parties

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